The English common-law historically has made the Court the sole Judge of the admissibility of evidence. Lord Abinger in *Bartlett* v. *Smith*, 11 Meeson & Welsby, 483 at p. 485 (Eng. Rep.) 1845, said:

> "All questions respecting the admissibility of evidence are to be determined by the Judge, who ought to receive that evidence, and decide upon it, without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the Judge and adjudicated on by him alone."

See also *Gorton* v. *Hadsell*, 9 Cush. 508, 511 (Mass. 1852); McKelvey on Evidence (3rd Edition) p. 66. It is submitted that to permit the Court to shift the question of relevancy or incompetency of evidence to a jury is to rob the adverse party of the very protection for which rules of evidence are designed.

The American Law Institute's Model Code of Evidence (1942 Rule 11) states that when the admissibility of evidence is in issue the question is for the Judge. The comment to this section (p. 65) says:

> "This Rule assumes the normal common law practice which requires the Judge to try and to determine disputes as to the existence of facts which are prerequisite * * * the admissibility of *relevant* evidence. * * * *the jury has nothing to do with the decision. That is for the Judge alone.*" Italics supplied.)

Wigmore says unequivocally:

> "That the Judge is to pass on the preliminary conditions necessary to the admissibility on evidence is unquestioned." (Wigmore's Treatise on Evidence—Third Edition, 1940 §1451 and 2550.)

See also Wigmore on Evidence (Student Text Sec. 464).

In only one situation have any Courts permitted juries to participate in a question of admissibility of evidence.

In the case of confessions offered in evidence and objected to as having been made involuntarily, some Courts, though decidedly not all, hold that *after* the Court has passed preliminarily upon the issue of voluntariness the jury may review this same issue in determining what weight to lend to the facts stated therein. Even in such States, however, the question whether there was any inducement held out or any pressure exerted calculated to make the confession untrue, *must be determined in the first instance by the Court.* See Henry Pennsylvania Trial Evidence (3rd Edition 1940) p. 124; and Pa. cases cited in Footnote 18 in accord. Compare *Ashcraft* v. *Tennessee*, 64 S. Ct. 921 (1944 U. S.), especially Footnote 2, p. 922, where this Court was critical of the Tennessee Court for admitting a confession in evidence in a criminal case without first affirmatively holding, as ostensibly required by earlier Tennessee cases, that the confessions were voluntary. Even this restricted practice of permitting the jury to participate with the Judge in the consideration of the voluntariness of the confession has been subjected to strong criticism. Thus, Wigmore's (Treatise on evidence, Supra, Sec. 861, p. 347), refers to this practice in some States as an "unpractical heresy."

In short, the great weight of authority has recognized the wisdom of making Courts rather than juries the guardians of admissibility. It is respectfully submitted, therefore, that the Trial Court erred in permitting the jury to consider the evidence of alleged finger marks, notwithstanding its instruction that the jury disregard the marks unless found to be those of deceased.

Accordingly, we submit, that the trial Judge did not perform his necessary preliminary judicial function of ruling on the relevancy and therefore the admissibility of the evidence, and that he erred when he asked the jury to do that in his stead.

Summary

1. There was no legal or equitable basis upon which the evidence of the marks could properly have been admitted.

2. Rule 46 requires only that an objection be taken in order to preserve the legal question involved for Appellate review. The opinion below requires that the objector move to strike such evidence admitted after objection. This requirement has no statutory authority and no Rule of Federal Civil Procedure justifies it.

3. The admission of these marks into evidence in this case was prejudicial error because it was the sole evidence on the only issue raised as a defense by the respondent.

4. The learned trial Judge failed preliminarily himself to rule on the relevancy and therefore the admissibility of the evidence in question, and passed that exclusively judicial function to the jury, thereby depriving the petitioners of a trial by judicial process.

Respectfully submitted,

B. Nathaniel Richter,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 1165.

JOSEPH E. SHENKO and RUTH A. SHENKO, Administrators of the Estate of Joseph E. Shenko, Jr., a Minor, Deceased,

Petitioners,

vs.

JACK COLE TRANSPORTATION CO.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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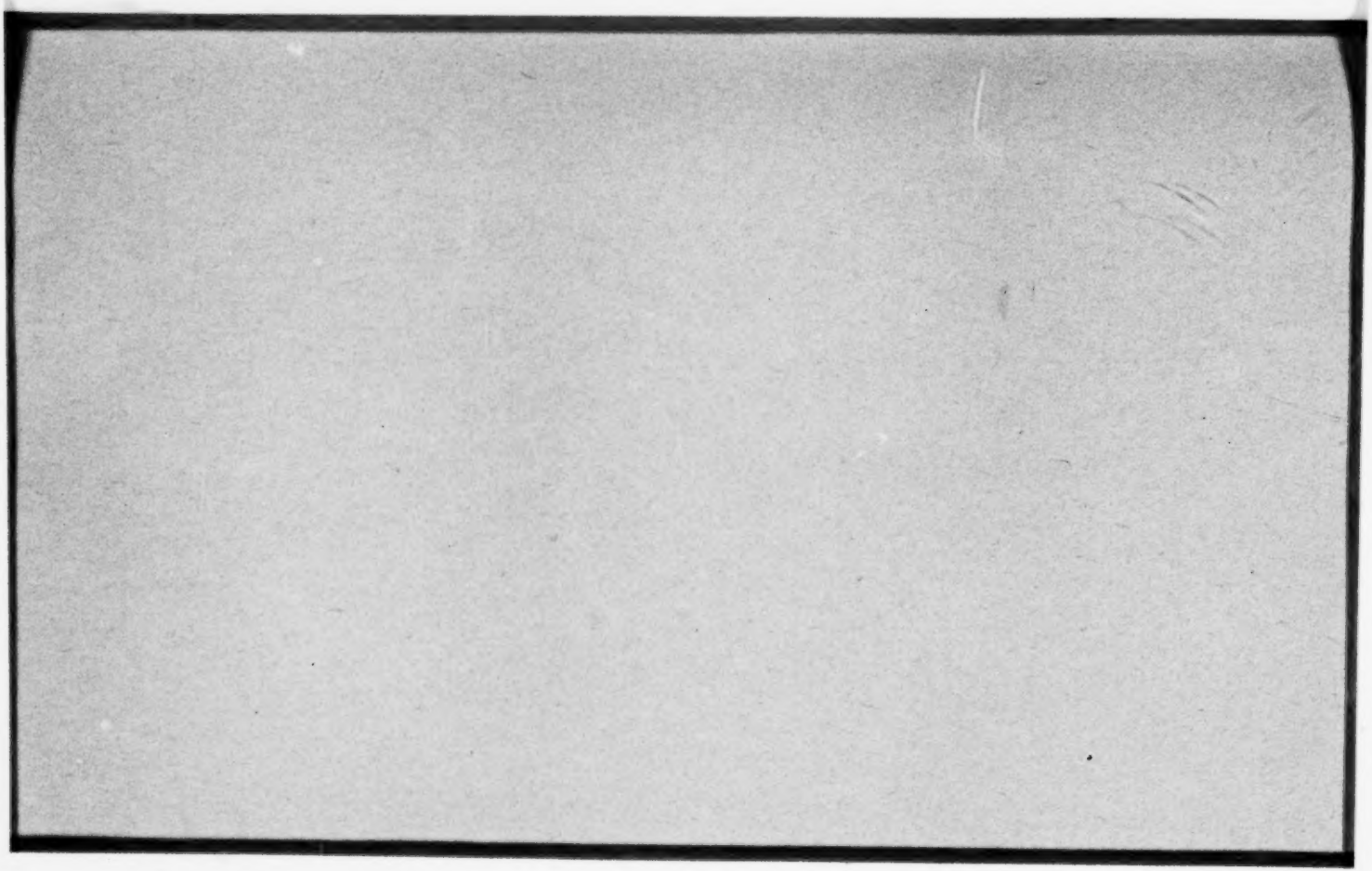

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TABLE OF CASES CITED

COUNTER-STATEMENT OF THE FACTS.

This was an action in trespass brought by plaintiffs, to recover damages for the death of their six year old son, who, plaintiffs contend was struck and killed by defendant's truck due to its negligent operation by defendant's servant.

At the trial, except for the testimony of one witness, John Plizak, hereinafter referred to, the evidence produced on behalf of the plaintiffs was largely circumstantial. The alleged accident occurred on the northeast corner of Newmarket Street and Fairmount Ave., Philadelphia, Pa. Defendant's truck proceeded south on Newmarket Street, made a left hand turn, proceeding east on Fairmount Ave. Immediately after the truck passed the intersection, the body of the decedent was discovered lying in the cartway and undoubtedly run over by some vehicle.

John Plizak, a seven year old boy, testified on behalf of the plaintiffs that he was talking to the decedent just before the accident; that he actually saw the decedent go into the cartway and that he saw the left front of the defendant's truck strike and knock him down (20a).

On cross-examination, he said that he could not see what happened after the truck got between him and the decedent (33a) and that he could not see the truck hit the decedent (34a).

Upon re-direct examination, he reiterated that he did see the truck strike the decedent (34a).

It also appeared that the plaintiffs did not give the name of John Plizak as an alleged eye witness to the occurrence to the police who were investigating the accident (81a), and that the said witness was not present either before the coroner or in the manslaughter trial of the driver (87a).

Defendant's driver testified that he saw no child in the street and the front of his truck did not strike the decedent and that he never saw the decedent until after his body was found lying in the street (70a).

The theory of the defense is that the decedent walked or ran into the left rear side of the defendant's truck after the front had passed him. In support of its theory, the defendant had its driver, Veneley Hyde, identify two photographs of the defendant's truck. One of them defendant's exhibit No. 2, a copy of which appears at 125a, shows the front of the truck and no traces of an accident are visible thereon. The other, defendant's exhibit No. 1, a copy of which appears at 124a, shows the left side of the defendant's truck and certain markings appear thereon on the rear left hand side of the vehicle, which defendant contends were traces of this accident. Both of these photographs were offered and received in evidence without any objection on the part of the plaintiff (67a, 68a).

Subsequently, defendant placed on the witness stand, George Hommel, a police officer of the City of Philadelphia. He testified that he saw the truck when he arrived at the police station about 5 P. M. (The accident occurred around 3 P. M. of the same day.) Without any objection interposed by the plaintiff, he was permitted to testify that he observed no marks on the vehicle except on the left rear side of the truck (81a).

He was then asked to describe the marks which he saw and he said that they appeared to be finger marks, when counsel for plaintiffs for the first time interrupted and objected to the testimony on the ground that there was "no connection between that testimony and the deceased" (81a).

In overruling this objection the trial judge said (82a) "I will allow him to say what he saw. Of course, his answer that he saw finger marks, unless the jury finds from the evidence that those are finger marks of the deceased boy, then that would be the only way that you could consider such evidence. If you believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence. . . . We will let the witness say just what he observed, and then it is a matter of argument between counsel as to whether or not it was the finger marks of this boy."

The witness was then shown the photographs of defendant's truck, the aforementioned defendant's exhibits No. 2 and No. 1 and he identified them as photographs of the vehicle involved in the accident and also said that the marks which appeared on the rear of the trailer were the marks which he observed at the time he inspected the truck (82a).

The witness then testified that the finger prints were very small in size, and not as large as a man's hand (83a). He also testified that there were "brush marks" on the vehicle at the rear left side of the body where something had rubbed against the vehicle at this spot (83a).

On cross-examination, the witness admitted that he did not know whether any of these marks were on the vehicle before the accident (84a) and also that the marks were located past the last wheel of the entire vehicle (84a).

ARGUMENT.

The questions presented by the petitioners do not meet the issues raised at trial, or in the Circuit Court of Appeals for the Third Circuit. The issue was as to the admissibility of the testimony of the police officer respecting the finger marks on the left rear of the trailer, and not the trial judge's instructions to the jury on the weight and credibility of such evidence.

Counsel for the petitioners thus confuses the requirements of evidence as scientific proof of the existence of a fact and the rules relating to the relevancy of evidence and the permissive inferences which may be drawn therefrom.

Professor Wigmore in his treatise on Evidence, Vol. I, sec. 31, p. 418, well states the distinction as follows:

"The peculiar danger of inductive proof is, that there may be other explanations than the desired one for the fact taken as a basis of proof. In the study of logic, we are concerned with discovering the defects of a mode of proof, while in